

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

Robert Peoples, #270600,)	C/A NO. 8:07-2897-CMC-BHH
)	
Plaintiff,)	
)	ORDER
v.)	
)	
SCDC; Warden Anthony Padula, Lee)	
Correctional Institution; Lt. Clarence)	
Rogers, Lee C.I.; Lt. Matthew Williams,)	
Lee C.I.; Nurse Cheryl Owens, Lee C.I.;)	
Sgt. Belinda Davis, Lee C.I.; Sgt. Vivian)	
McCall, Lee C.I.; and IGC Ms. Driggers;)	
All in their individual Capacities,)	
)	
Defendants.)	
_____)	

This matter is before the court on Plaintiff's *pro se* complaint, filed in this court pursuant to 42 U.S.C. § 1983.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(d), DSC, this matter was referred to United States Magistrate Judge Bruce Howe Hendricks for pre-trial proceedings and a Report and Recommendation ("Report"). On April 1, 2008, the Magistrate Judge issued a Report recommending that Defendants' motion to dismiss be denied. The Magistrate Judge advised the parties of the procedures and requirements for filing objections to the Report and the serious consequences if they failed to do so. Neither party has objected to the Report and the time for doing so has expired.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court.

See Mathews v. Weber, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b). The court reviews the Report only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that “in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”) (citation omitted).

After reviewing the record of this matter, the applicable law, and the Report and Recommendation of the Magistrate Judge, the court agrees in part and disagrees in part with the Magistrate Judge. Magistrate Judge Hendricks determined that Plaintiff had technically exhausted his administrative remedies, as his grievance had been returned to him by South Carolina Department of Corrections (SCDC) personnel unprocessed and Plaintiff’s attempt to exhaust his administrative remedies had been thwarted by SCDC officials. Report at 6 (Dkt. #40, filed Apr. 1, 2008) (Plaintiff “did not have recourse to any other available administrative remedy.”). However, while it appears Plaintiff was on “grievance restriction” and limited to filing a certain number of grievances per month, the record does not reveal that Plaintiff could not, for example, re-file his grievance at a later time or that he could not appeal the return of his unprocessed grievance. *See, e.g., Moore v. Bennette*, 517 F.3d 717, 730 (4th Cir. 2008) (affirming district court’s decision that Plaintiff had failed to exhaust his administrative remedies but noting that Plaintiff had “no excuse for not resubmitting the grievance” after the completion of another grievance). The court agrees with

the Magistrate Judge that Defendants' motion to dismiss should be denied as it is currently presented, but such denial is without prejudice to Defendants' right to re-file, within fifteen (15) days of the filing of this order, a supplemental motion to dismiss for failure to exhaust administrative remedies.

If Defendants do not to file a supplemental motion to dismiss for failure to exhaust administrative remedies, Defendants shall file a final dispositive motion, if they so choose, within forty-five (45) days of the filing of this order. This matter is resubmitted to the Magistrate Judge for further pretrial proceedings.

Defendants' motion to dismiss (Dkt. # 19, filed Oct. 19, 2007) is **denied**.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
April 28, 2008